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CPLR 305(b): Plaintiff's Service of Bare Summons Is Jurisdictional Defect, But Defect Is Waived by Defendant's Service of Notice of Appearance and Demand for Complaint

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Moreover, in view of the timely notice concern, it is suggested that the *Carrick* Court could properly have held CPLR 203(e) applicable in lieu of CPLR 205(a).[27] CPLR 203(e) permits an otherwise untimely claim asserted in an amended pleading to relate back to claims which were timely asserted in the original pleading.[28] Thus, the use of that section to amend a dismissed wrongful death action to a preexisting survival action would appear to satisfy the timely notice requirement and not be prejudicial to the defendant. Such an approach would encourage procedural efficiency by obviating the need to first dismiss an action, and then reinstitute that action under CPLR 205(a).[29]

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ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 305(b): Plaintiff's service of bare summons is jurisdictional defect, but defect is waived by defendant's service of notice of appearance and demand for complaint

CPLR 305(b) requires that the summons commencing an

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supra. Of course, it has been held that proper CPLR 304 service entails fulfillment of CPLR 305(b). *See* Young v. Franklyn, 93 Misc. 2d 508, 402 N.Y.S.2d 966 (N.Y.C. Civ. Ct. Bronx County 1978). CPLR 305(b) stipulates that when a complaint is not served with a summons, the summons must contain a notice of the nature of the claim and the relief sought. CPLR 305(b)(McKinney Supp. 1980-1981). Nevertheless, one court has held that failure to comply with CPLR 305(b) will not preclude the subsequent use of CPLR 205(a) to reinstitute the claim. *See* Limpert v. Garland, 100 Misc. 2d 525, 419 N.Y.S.2d 863 (Sup. Ct. Erie County 1979). *See also* CPLR 305(b) commentary at 96 (McKinney Supp. 1980-1981); CPLR 3012:1 commentary at 83 (McKinney Supp. 1980-1981); SIEGEL § 60, at 11 (1979-1980 pam.). Thus, timely service by summons, without CPLR 305(b) notice, would appear to be the *sine qua non* to use of CPLR 205(a).

[27] A similar solution was advocated by Judge Meyer in his concurrence in *Carrick*. *See* 51 N.Y.2d at 255, 414 N.E.2d at 639, 434 N.Y.S.2d at 137 (Meyer, J., concurring) (citing Jones v. State, 51 N.Y.2d 943, 952-53, 416 N.E.2d 1050, 1054-55, 435 N.Y.S.2d 715, 719-20 (1980) (Meyer, J., dissenting)). *See* note 23 and accompanying text *supra*. *See also* Caffaro v. Trayna, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974).

[28] CPLR 203(e) (1972). *See* note 18 *supra*.

[29] Although the utilization of CPLR 203(e) in lieu of CPLR 205(a) would be in the interest of judicial economy, there is scant support for the concept, since the amending-back provisions of CPLR 203(e) consistently have been held to depend on a valid preexisting claim. *See* 51 N.Y.2d at 248, 414 N.E.2d at 635, 434 N.Y.S.2d at 133; Goldberg v. Camp Mikan-Recro, 42 N.Y.2d 1029, 1030, 369 N.E.2d 8, 8, 398 N.Y.S.2d 1008, 1009 (1977) (mem.); Caffaro v. Trayna, 35 N.Y.2d 245, 250, 319 N.E.2d 174, 176, 360 N.Y.S.2d 847, 850 (1974); Mogavero v. Stony Creek Dev. Corp., 53 App. Div. 2d 1021, 1021, 385 N.Y.S.2d 899, 900 (4th Dep't 1976); note 18 *supra*.

action be accompanied by either a complaint or a written notice detailing the nature of the action and the relief sought.[30] As amended, the statute eliminates the traditional use of the "bare summons" as a permissible method of commencing an action.[31] In

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[30] CPLR 305(b) provides:

> If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default.

CPLR 305(b) (McKinney Supp. 1980-1981). It is unclear what degree of specificity is required when stating the "nature of the action and relief sought" in the 305(b) notice. A partial description, however, may be deemed inadequate. *See* Schoonmaker v. Ford Motor Co., 99 Misc. 2d 1095, 418 N.Y.S.2d 288 (Sup. Ct. Ulster County 1979). In *Schoonmaker*, the notice described the nature of the action as one for "wrongful death, conscious pain and suffering and loss of services" and the relief sought as "monetary damages in the amount of $10,000,000." *Id.* at 1095, 418 N.Y.S.2d at 299. The court stated that the notice did not satisfy the requirements of CPLR 305(b) in that "if a default occurred and judgment was entered thereon that judgment would be jurisdictionally defective and subject to vacatur." *Id.* at 1095, 418 N.Y.S.2d at 289; *cf.* Arden v. Loew's Hotels Inc., 40 App. Div. 2d 894, 894, 337 N.Y.S.2d 669, 670 (3d Dep't 1972) (statement that " 'upon your default, judgment will be taken against you for the sum of $50,000' " insufficient to satisfy preamendment requirement that the "object of the action" be stated). For analysis of the difference between the former "object of the action" language and the new requirement that the notice state the "nature of the action," see CPLR 305, commentary at 96-97 (McKinney Supp. 1980-1981). *See generally* FIFTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1977), in TWENTY-THIRD ANN. REP. N.Y. JUD. CONFERENCE 275-76 (1978) [hereinafter cited as REPORT] (the former language "could be misread as a redundancy denoting merely a requirement to specify the type of relief sought in terms of damages or other remedy"). The inclusion within the summons of the CPLR 305(b) notice, described by the draftsmen as a type of "short form complaint," is a convenient alternative to the more time-consuming process of drawing up a formal complaint, and allows practitioners to exploit the transitory presence of the defendant in order to acquire personal jurisdiction. *Id.* at 275-76.

[31] REPORT, *supra* note 30, at 273. Under prior law, a plaintiff could commence an action in three ways: through service of a bare summons, through service of a summons accompanied by a complaint, or through service of a summons which included a 305(b) notice detailing the object of the action and the relief sought. Ch. 749 [1974] N.Y. Laws 1783 (CPLR 305(b) prior to 1978 amendments). Practitioners who utilized the bare summons to commence an action were often unaware that, in order to take a default judgment, CPLR 3215(e) requires a plaintiff to file proof that either a CPLR 305(b) notice or complaint was served with the summons. *See* CPLR 3215(e) (McKinney Supp. 1980-1981); REPORT, *supra* note 30, at 273. Plaintiffs serving bare summonses, therefore, were unable to take proceedings to enter default judgments, and judgments which had been entered without the requisite proof of service were subject to vacatur. McDermott v. Hoenig, 32 App. Div. 2d 838, 302 N.Y.S.2d 280 (2d Dep't 1969). Additionally, pre-CPLR cases indicated that a plaintiff could not remedy service of a bare summons by later serving the complaint without the defendant's demand. Gluckselig v. H. Michaelyan Inc., 132 Misc. 783, 230 N.Y.S. 593 (Sup. Ct. N.Y. County 1928). *See also* Ardila v. Roosevelt Hosp., 55 App. Div. 2d 557, 389 N.Y.S.2d 853 (1st Dep't 1976) (plaintiff who serves bare summons under no obligation, for the purpose of avoiding dismissal under CPLR 3012(b), to serve complaint in absence of defendant's demand).

In order to eliminate these difficulties, both CPLR 305(b) and CPLR 3012(b) were

the wake of the amendment, however, it has been unclear whether service of a summons without a complaint or a 305(b) notice would be deemed a jurisdictional defect.[32] Recently, in *Aversano v. Town of Brookhaven*,[33] the Appellate Division, Second Department, held that service of a bare summons does not confer jurisdiction over the person of the defendant.[34] The defendant's service of a notice of appearance and demand for the complaint, however, was held to waive the defect.[35]

The plaintiff in *Aversano* commenced an action by serving a bare summons shortly before the expiration of the statute of limi-

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amended in 1978. *See* ch. 528, §§ 1, 4 [1978] N.Y. Laws 936. Now a defendant must make a demand for the complaint within the time specified in CPLR 320(a) for making an appearance, and if no such demand is made, the complaint nevertheless must be served within 20 days of the defendant's service of the notice of appearance. CPLR 3012(b) (McKinney Supp. 1980-1981). *See also* CPLR 320(a) (McKinney Supp. 1980-1981). The plaintiff's demand for the complaint does not constitute an appearance, but operates to extend the defendant's time to appear until 20 days after the complaint is served. CPLR 3012(b) (McKinney Supp. 1980-1981); 3 WK&M ¶ 3012.13 at 30-199; CPLR 3012, commentary at 87 (McKinney Supp. 1980-1981). *See generally* Homburger and Laufer, *Appearance and Jurisdictional Motions in New York*, 14 BUFFALO L. REV. 374, 393-400 (1965).

[32] *Compare* Limpert v. Garland, 100 Misc. 2d 525, 419 N.Y.S.2d 863 (Sup. Ct. Erie County 1979) *and* Kane v. Erny, N.Y.L.J., June 12, 1979, at 16, col. 2 (Sup. Ct. Suffolk County) *with* Schoonmaker v. Ford Motor Co., 99 Misc. 2d 1095, 418 N.Y.S.2d 288 (Sup. Ct. Ulster County 1979). In *Limpert*, the plaintiff commenced an action by serving a bare summons. 100 Misc. 2d at 526, 419 N.Y.S.2d at 864. The defendant moved to dismiss, maintaining that the summons was jurisdictionally defective since it did not contain the requisite notice setting forth the nature of the action and the relief sought as required by the amended CPLR 305(b). *Id.* at 525-26, 419 N.Y.S.2d at 864. The court granted the defendant's motion to dismiss, indicating that the failure to comply with the mandatory notice provision of CPLR 305(b) is jurisdictional. *Id.* at 526, 419 N.Y.S.2d at 864. Although the defendant in *Kane* had served a notice of appearance and demand for the complaint, the court nevertheless concluded that it lacked jurisdiction over the defendant because service of the bare summons was improper. N.Y.L.J., June 12, 1979, at 16, col. 3 (Sup. Ct. Suffolk County 1979). The *Schoonmaker* court, however, rejected the contention that the failure of the notice to conform with CPLR 305(b) deprived the court of jurisdiction over the defendant. 99 Misc. 2d at 1096, 418 N.Y.S.2d at 289. In denying the defendant's motion to dismiss, the court stated that consideration of the impact of a deficient notice was limited to a default context. *Id.*

While courts may differ with respect to whether a bare summons properly commences an action, the commentators concur in ascribing jurisdictional significance to such service. Professor Siegel asserts that the draftsmen of the amendment intended the service of a bare summons to be a jurisdictional defect resulting in dismissal of the plaintiff's action. SIEGEL § 69 at 11 (Supp. 1979-1980); CPLR 3012, commentary at 87-88 (McKinney Supp. 1980-1981). *See also* 3 WK&M ¶ 3012.13 at 30-199. It has been suggested, moreover, that the plaintiff's only remedy after the defective service would be to recommence the action *if* the statute of limitations has not yet expired. *Id.* (emphasis added).

[33] 77 App. Div. 2d 641, 430 N.Y.S.2d 133 (2d Dep't 1980).

[34] *Id.* at 642, 430 N.Y.S.2d at 134.

[35] *Id.*

tations.[36] The defendant then served a notice of appearance and a demand for the complaint.[37] After the appropriate limitations period had expired, the defendant moved to dismiss the action for lack of jurisdiction.[38] Special term, however, denied the motion, holding that the failure to comply with CPLR 305(b) was jurisdictional only for the purpose of taking a default judgment.[39]

In a memorandum opinion, the Appellate Division, Second Department, affirmed, holding that the defendant conferred jurisdiction on the court by serving a notice of appearance and demand for the complaint.[40] In reaching its determination, the *Aversano* court adopted the rationale of *Bal v. Court Employment Project Inc.*,[41] a case which involved almost identical facts.[42] In *Bal*, the Appellate Division, First Department, indicated that the CPLR 305(b) requirement that the summons be served with either a complaint or appropriate notice serves to ensure that the plaintiff has the requisite papers for entering a default judgment and to give the defendant notice of the nature of the action.[43] The *Bal* court further observed that a defendant's service of a notice of appearance and demand for the complaint indicates that he has received notice and intends to appear in the action.[44] The *Bal* court concluded, therefore, that by serving a notice of appearance and demand for the complaint, the defendant had conferred jurisdiction on the court and that any defect created by the service of a bare summons was insufficient to justify dismissal of the action.[45]

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[36] *Id.* The bare summons was served 3 months before the expiration of the appropriate statute of limitations. *Id.*

[37] *Id.* at 641, 430 N.Y.S.2d at 134.

[38] *Id.* The defendant moved to dismiss prior to receipt of the complaint. *Id.* at 642, 430 N.Y.S.2d at 134.

[39] *Id.* at 641-42, 430 N.Y.S.2d at 134.

[40] *Id.* at 641, 430 N.Y.S.2d at 134.

[41] 73 App. Div. 2d 69, 424 N.Y.S.2d 715 (1st Dep't 1980).

[42] *Compare* Aversano v. Town of Brookhaven, 77 App. Div. 2d at 642, 430 N.Y.S.2d at 134 *with* Bal v. Court Empl. Project Inc., 73 App. Div. 2d at 70-71, 424 N.Y.S.2d at 716-17. In *Bal*, the plaintiff commenced an action 3 days before the statute of limitations expired and 3 days after enactment of the amended CPLR 305(b). 73 App. Div. 2d at 70, 424 N.Y.S.2d at 716. The defendant then served a notice of appearance and demand for the complaint. *Id.* Three months later the plaintiff served the complaint and the defendant moved to dismiss based upon the untimely service. *Id.* Special term denied the defendant's motion to dismiss and the Appellate Division, First Department, affirmed. *Id.* at 72, 424 N.Y.S.2d at 717.

[43] *Id.* at 70, 424 N.Y.S.2d at 716.

[44] *Id.* at 71, 424 N.Y.S.2d at 716-17.

[45] *Id.*, 424 N.Y.S.2d at 717.

Although *Aversano* and *Bal* appear to indicate that noncompliance with the requirements of CPLR 305(b) is a jurisdictional defect, neither case adequately addressed the precise nature of the defect waived. An analysis of the report of the draftsmen of the amended statute indicates that the change was not intended to narrow the methods for properly commencing an action, but rather to alert plaintiffs that compliance with the mandatory notice provisions of CPLR 3215 requires service of either a complaint or a summons containing the CPLR 305(b) notice.[46] Since the express purpose of the statute is to preserve the ability of unwary plaintiffs to obtain relief despite a defendant's inaction, it is submitted that there exists no basis to import an intent to otherwise expand the jurisdictional significance of failing to comply with CPLR 305(b).[47] Moreover, the failure of the legislature to amend CPLR 304, which apparently continues to sanction the use of a bare summons to commence an action, further indicates that a narrow interpretation of the jurisdictional effects of noncompliance is warranted.[48] In-

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[46] CPLR 3215(e) requires that an applicant for a default judgment show proof that a complaint or adequate 305(b) notice was served with the summons. CPLR 3215(e) (McKinney Supp. 1980-1981). Failure to serve notice or the service of an inadequate notice precludes entry of a default judgment or may result in the vacation of a judgment. A.J. Ekert Co. v. George A. Fuller Co., 51 App. Div. 2d 844, 380 N.Y.S.2d 353 (3d Dep't 1976); Arden v. Loew's Hotels Inc., 40 App. Div. 2d 894, 337 N.Y.S.2d 669 (3d Dep't 1972); McDermott v. Hoenig, 32 App. Div. 2d 838, 302 N.Y.S.2d 280 (2d Dep't 1969). In *McDermott*, a default judgment had been taken against defendants who had been served with a bare summons. 32 App. Div. 2d at 838, 302 N.Y.S.2d at 281. Describing the notice as a "nullity," the court granted the defendants' motion to vacate based upon the plaintiff's failure to file proof of service of the summons and complaint or a summons and notice. *Id. See generally* CPLR 3012, commentary at 87-88 (McKinney Supp. 1980-1981); SEIGEL § 293 at 346-51.

> In the Judicial Conference Report the draftsmen of the amended statute state:
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> The permissive language now contained in CPLR 305(b) . . . constitutes a serious trap for the unwary practitioner who is not familiar with the default provisions of CPLR 3215(e) governing proof of default . . . .
>
> Under the proposed amendment the uncertainty now surrounding default practice under CPLR 305(b) and 3215(c), (e) would be avoided by the mandatory notice provision.

REPORT, *supra* note 30 at 275. The draftsmen's preoccupation with the elimination of "pleading traps" belies the argument that they failed to detail fully the impact of the new law. Thus it is submitted that they did not intend to alter the established means of commencing an action by rendering a formerly permissible method of service jurisdictional.

[47] *Id.* at 273-77. No specific or implicit reference is made by the draftsmen with respect to the nature of noncompliance when the entry of a default judgment is not the question presented. *Id.*

[48] CPLR 304 provides in pertinent part: "An action is commenced and jurisdiction acquired by the service of a *summons*." CPLR 304 (emphasis added). *Cf.* CPLR 320(a) (McKinney Supp. 1980-1981)("An appearance shall be made within twenty days after the service of the summons . . . ."). Although existing law should be construed so as to give the

deed, the inconsistency between CPLR sections 304 and 305(b) could operate to mislead an innocent but uninformed plaintiff, with the resulting noncompliance, if deemed jurisdictional, constituting a potentially incurable defect.[49] Thus, a trap more serious than the one sought to be eliminated by the amendment would exist. It is suggested, therefore, that the service of a bare summons should be deemed commencement of an action and that the jurisdictional consequences of failure to comply with CPLR 305(b) should be relegated to consideration only within a default context.[50]

Once it is determined that it is jurisdictionally proper to commence an action by service of a bare summons, the question arises as to the means available to the plaintiff to cure the defect in order to preserve his right to enter a default judgment. It is suggested that if the defendant fails to respond when a bare summons is properly served—thus placing himself in technical default, the plaintiff should be permitted to move to amend the summons to include the required notice, pursuant to CPLR 305(c),[51] within the

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amended CPLR 305(b) its intended effect, it is suggested that the apparent purpose of the new law—to alert plaintiffs that a bare summons is insufficient to support a default judgment under CPLR 3215—may be effectuated without ascribing jurisdictional consequences to an attempted commencement with a bare summons.

[49] If CPLR 304 is interpreted to incorporate the mandatory notice provisions of CPLR 305(b)—thus making commencement depend upon the service of either a summons with complaint or a CPLR 305(b) notice—CPLR 205(a) would appear unavailable to permit reinstitution of the action in the event of dismissal after the statute of limitations expires. *See* Carrick v. Central Gen. Hosp., 51 N.Y.2d 242, 414 N.E.2d 632, 434 N.Y.S.2d 130 (1980). In *Carrick*, the Court of Appeals recently stated that "the use of [CPLR 205(a) requires] that a prior timely action, however flawed, actually was 'commenced' within the meaning of CPLR 304." *Id.* at 249, 414 N.E.2d at 635, 434 N.Y.S.2d at 134. Indeed, it has been suggested that noncompliance with 305(b) nullifies the effect of the service for the purposes of 205(a). 3 WK&M ¶ 3012.13 at 30-199. *But see* Limpert v. Garland, 100 Misc. 2d 525, 419 N.Y.S.2d 863 (Sup. Ct. Erie County 1979); Kane v. Erny, N.Y.L.J., June 12, 1979, at 16, col. 2 (Sup. Ct. Suffolk County 1979); SEIGEL § 52 at 54. Although both the *Kane* and *Limpert* courts held that the service of a bare summons failed to properly commence an action, thus depriving the court of jurisdiction over the persons of the defendant, they nevertheless granted permission to recommence pursuant to CPLR 205(a). Limpert v. Garland, 100 Misc. 2d at 326, 419 N.Y.S.2d at 864, Kane v. Erny, N.Y.L.J., June 12, 1979, at 16, col. 3. Notably, neither *Limpert* nor *Kane* explained how CPLR 205(a) could be applicable when no prior action was held to exist.

[50] *See* Schoonmaker v. Ford Motor Co., 99 Misc. 2d 1095, 418 N.Y.S.2d 288 (Sup. Ct. Ulster County 1979). The *Schoonmaker* court indicated that although a summons containing an inadequate CPLR 305(b) notice was jurisdictionally defective, it nevertheless held that such service properly commences an action when no default occurs. *Id.*, 418 N.Y.S.2d at 289.

[51] CPLR 305(c) provides in part: "At any time in its discretion . . . the court may allow

1-year period prescribed for entering a default judgment.[52] In order to avoid the prejudice which might counsel against allowing such amendment,[53] however, it is submitted that the defendant, upon receipt of the amended summons, should then have the opportunity to appear and submit responsive pleadings within the time stated in CPLR 320(a).[54] If the defendant moves to dismiss immediately upon the receipt of a bare summons, the plaintiff again should be permitted to cross move for leave to amend the summons.[55] If the plaintiff does not so move and dismissal occurs after the statute of limitations has expired, he should be permitted to recommence pursuant to CPLR 205(a).[56] Should the defendant respond to the service of a bare summons, as in *Bal* and *Aversano*, by filing a notice of appearance and demand for the complaint, a waiver of any objection based upon the failure to comply with CPLR 305(b) should result.[57]

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the summons . . . to be amended if a substantial right of a party against whom the summons is issued is not prejudiced." CPLR 305(c) (1972). *See also* SEIGEL § 64 at 65; 1 WK&M ¶ 305.14 at 3-173.

[52] *See* Keyes v. McLaughlin, 49 App. Div. 2d 974, 373 N.Y.S.2d 891 (3d Dep't 1978). *See also* SEIGEL § 231 at 280.

[53] The amendment of a summons under CPLR 305(c) generally is permitted when the defect to be corrected is insubstantial or a mere irregularity. Ryan v. Nationwide Mut. Ins. Co., 20 App. Div. 2d 270, 247 N.Y.S.2d 243, (4th Dep't 1964); SEIGEL § 64 at 65. If the statute of limitations has expired, it may be argued that the relation back aspects of CPLR 305(c) operate to prejudice a defendant whose inaction in reliance upon the deficiency of a bare summons is based on the plaintiff's violation of CPLR 305(b). When a defendant is timely apprised of the plaintiff's action, however, and is afforded the right to appear and respond to an amended summons, it is submitted that any potential prejudice of allowing cure of a CPLR 305(b) defect is significantly reduced.

[54] CPLR 320(a) provides that a defendant to whom a summons had been personally delivered must appear within 20 days. CPLR 320(a) (McKinney Supp. 1980-1981). A defendant served other than by personal delivery is given 30 days within which to appear. *Id.*

[55] *See* note 53 *supra*. One commentator's interpretation of *Bal* indicates that a CPLR 305(c) cross motion to amend the summons might be granted. Professor Seigel asserts that "even if the defendant does not serve a notice of appearance or a demand for the complaint, but forthwith moves to dismiss the action based on service of a naked summons, dismissal is not the guaranteed outcome." CPLR 3012, commentary at 81 (McKinney Supp. 1980-1981).

[56] *See* Limpert v. Garland, 100 Misc. 2d 525, 419 N.Y.S.2d 863 (Sup. Ct. Erie County 1979); Kane v. Erny, N.Y.L.J., June 12, 1979, at 16, col. 2 (Sup. Ct. Suffolk County 1979), note 49 *supra*.

[57] Since the CPLR 3215 requisites to entering a default judgment exist to ensure that the defendant receives adequate notice, A.J. Ekert Co., v. George A. Fuller Co., 51 App. Div. 2d 844, 380 N.Y.S.2d 353 (3d Dep't 1976); Arden v. Loew's Hotels Inc., 40 App. Div. 2d 894, 337 N.Y.S.2d 669 (3d Dep't 1972); McDermott v. Hoenig, 32 App. Div. 2d 838, 302 N.Y.S.2d 280 (2d Dep't 1969), it is submitted that when the defendant requests the notice to which he is statutorily entitled by serving a notice of appearance and demand for the complaint, he should not be permitted to complain that the plaintiff's noncompliance with 305(b) pre-

It is submitted that application of the statute as outlined above equitably implements the new provision without diluting the defendant's right to receive notice, and without creating technical pitfalls designed to frustrate the plaintiff's ability to reach the merits of a dispute. Since the defendant has received actual timely notice, it is unlikely that he will be prejudiced if the plaintiff's error is made remediable.[58] It is suggested, therefore, that unless the defendant can demonstrate that he was prejudiced by the plaintiff's failure to comply with CPLR 305(b), permission to cure the defect should be granted freely.[59] Finally, since the defendant's inaction may operate to prolong the dispute without producing any real benefit under the analysis offered above, it is urged that the defendant, upon receipt of a bare summons, should file a notice of appearance and demand for the complaint. If no complaint is received within the period prescribed by CPLR 3012(b), a final dismissal on the merits may be granted.[60]

In holding that noncompliance with CPLR 305(b) was waived

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cludes the entry of a default judgment.

[58] *Cf.* Stuyvesant v. Weil, 167 N.Y. 421, 60 N.E. 738, (1901) (misnomer of party is amendable irregularity when defendant is fairly apprised of plaintiff's action); Luce v. Pierce Muffler Shops, 51 Misc. 2d 256, 272 N.Y.S.2d 845 (Onondaga County 1966) *aff'd*, 28 App. Div. 2d 826, 282 N.Y.S.2d 724 (4th Dep't 1967) (court acquired jurisdiction over defendant when service of process effected under misnomer apprised defendant of the plaintiff's action). *See also* Covino v. Alside Aluminum Supply Co., 42 App. Div. 2d 77, 345 N.Y.S.2d 721 (4th Dep't 1973) ("the policy of permitting mistakes to be corrected at any stage of the action has always been liberal and from this policy there has been no departure following the enactment of the CPLR").

[59] One commentator has proposed that an appropriate penalty for failure to comply with CPLR 305(b) may consist in the "assessment of an attorney's fee, payable by the plaintiff to the defendant, to cover the cost of the motion . . . ." CPLR 3012, commentary at 81 (McKinney Supp. 1980-1981).

[60] Under CPLR 3012(b), the defendant's service of a notice of appearance or demand for the complaint triggers the plaintiff's duty to serve the complaint within 20 days. CPLR 3012(b) (McKinney Supp. 1980-1981); Bal v. Court Empl. Project Inc., 73 App. Div. 2d at 70, 424 N.Y.S.2d at 716. The court upon motion may dismiss the action if the plaintiff fails to serve the complaint within the time provided by CPLR 3012(b). Williams v. Howard, 75 App. Div. 2d 894, 428 N.Y.S.2d 54 (2d Dep't 1980); Merchandising Presentation Inc. v. Jack Blumenfeld, 74 App. Div. 2d 523, 425 N.Y.S.2d 17 (1st Dep't 1980). The absence of an acceptable excuse for delaying the service of the complaint is determinative. Hellner v. Mannow, 41 App. Div. 2d 525, 340 N.Y.S.2d 15 (1st Dep't 1973) (per curiam). Notably, at least one court has characterized the failure to serve a complaint as required by CPLR 3012(b) as a neglect to prosecute within the meaning of CPLR 205(a), thus precluding the plaintiff from reinstituting the action since the statute of limitations had expired prior to dismissal. Schwartz v. Luks, 46 App. Div. 2d 634, 359 N.Y.S.2d 899 (1st Dep't 1974)(per curiam); Wright v. Farlin, 42 App. Div. 2d 141, 346 N.Y.S.2d 11 (3d Dep't), *appeal dismissed*, 33 N.Y.2d 657, 303 N.E.2d 705, 348 N.Y.S. 2d 980 (1973); Fisher v. Tier Oil Co., 75 Misc. 2d 162, 347 N.Y.S.2d 512 (Sup. Ct. Broome County 1973).

by the defendant's service of a notice of appearance and demand for a complaint, the *Aversano* decision appears to evidence a trend toward a liberal construction of the statute.[61] The precise jurisdictional effect of noncompliance, however, remains uncertain. It is hoped that future assessment of the consequences of noncompliance will reflect the intentions of the draftsmen and not operate to peremptorily deprive the plaintiff of his day in court on the merits of his claim. Until the contours of new legislation are defined, however, the practitioner is well advised to include either the CPLR 305(b) notice or the complaint with his summons, even if default is not anticipated.

Carl J. Laurino, Jr.

CPLR 311(1): Validity of service of process upon corporate employee upheld based on process server's reasonableness and diligence

Under CPLR 311(1), personal service on a corporation may be effected by delivery of a summons to a corporate official or an "agent authorized by appointment" to receive process.[62] In accordance with the statute's purpose of giving the corporation notice of the commencement of a suit,[63] a liberal trend has developed to ex-

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[61] Under the CPLR the defendant's service of a notice of appearance generally will not operate as a waiver of the defendant's objections to personal jurisdiction so long as an objection to jurisdiction is made in a CPLR 3211(a)(8) motion or in the answer as provided by CPLR 3211(e). CPLR 320(b).

[62] CPLR 311 (Supp. 1980-1981) provides in pertinent part:

> Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service . . . .

CPLR 311(1). The statute consolidated section 229 and parts of section 228 of the CPA and was based upon rule 4(d)(3) of the Federal Rules of Civil Procedure. SECOND REP. at 161. There was no change in substance from the CPA, SECOND REP. at 161, the main thrust of the legislation being the elimination of the previous distinctions between service of process in domestic and foreign corporations, *id.*; *see* CPLR 311(1), commentary at 254 (1972). *Compare* CPA § 228(8)-(9) *with* CPA § 229(3). Delivery of the summons to the Secretary of State, under the "agent authorized by . . . law" clause of CPLR 311(1), provides another means of obtaining personal jurisdiction. This is provided for in N.Y. BUS. CORP. LAW §§ 306, 307 (McKinney 1963 & Supp. 1980-1981). *See* note 84 *infra*.

[63] *See, e.g.*, Fashion Page, Ltd. v. Zurich Ins. Co., 50 N.Y.2d 265, 271-72, 406 N.E.2d 747, 750, 428 N.Y.S.2d 890, 893 (1980). Notice to the corporation was also the purpose of the predecessors of CPLR 311(1). Barrett v. American Tel. & Tel. Co., 138 N.Y. 491, 493, 34